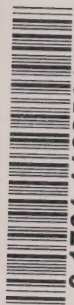


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POLICY AND GUIDELINE

ON ACCESS TO

ENVIRONMENTAL EVALUATIONS

NOVEMBER, 1995

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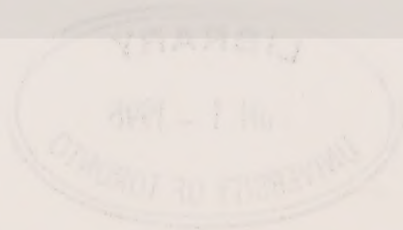
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POLICY

ACCESS TO ENVIRONMENTAL EVALUATIONS

The Government of Ontario is committed to the protection and conservation of our natural environment. The Ministry of Environment and Energy for Ontario (MOEE) carries out this direction by ensuring that established standards are met and by encouraging the development of environmental protection programs.

The MOEE recognizes that business in Ontario, which shares the responsibility and commitment to environmental protection, has taken the initiative to develop voluntary programs of self-evaluation, both as an effective management tool and as a means of promoting environmental protection. The Ministry wishes to encourage the continued development and use of environmental evaluations and acknowledges that ensuring the confidentiality of these evaluations will help to promote their use.

The intent of this policy is to provide assurance to business in Ontario, including industrial, commercial and agricultural operations, that MOEE will respect the confidentiality of self-initiated evaluations and will not, as a matter of course, demand or request access to environmental evaluations. The policy sets out the exceptional circumstances under which MOEE will require access to environmental evaluations and the progressive steps that staff must follow in securing access.

By providing greater certainty, this policy will encourage environmentally responsible companies and individuals to continue to develop and use environmental evaluations. It will also continue to allow the MOEE to carry out its responsibility to take action to protect the environment in urgent or serious environmental situations.

GUIDELINE

ACCESS TO ENVIRONMENTAL EVALUATIONS

1. Definition of Environmental Evaluations

Environmental evaluations are internal formal and structured evaluations or self-initiated assessments of existing or potential environmental impacts. They are conducted voluntarily by individuals, public institutions and companies, including many business, industrial, commercial and agricultural operations. They may be carried out by outside consultants, employees of the business, or other review groups and individuals.

Evaluations may be conducted for a wide range of purposes, including risk assessment, compliance verification, property dealings, business and financial interests, and management systems. They can identify compliance problems, weaknesses in management systems and areas of environmental risk. They also can provide opportunities to reduce liability as well as to improve and assess the progress of environmental performance.

Environmental evaluations include, but are not limited to, the following: evaluations that verify the applicability of and compliance with statutory and regulatory requirements; evaluations of the effectiveness of environmental management systems; and, evaluations that assess risks from regulated and unregulated materials, processes and practices. Routine and normal operational activities including performance testing, monitoring and inspections are not considered to be evaluations.

Evaluations are sometimes referred to as environmental audits, site assessments, investigative reviews, risk assessments, compliance verification evaluations, analyses, surveys, studies and associated plans to improve environmental performance and resource usage. They may cover total operations, individual sites, or specific substances, resources, or regulatory areas (such as air pollution) of concern. In this policy, these kinds of self-initiated reviews are referred to as "environmental evaluations" or simply "evaluations". Evaluations also refer to any part of an evaluation.

Evaluations covered by this policy are proactive assessments conducted on a voluntary basis, but not reports specifically undertaken as a result of an incident which has already taken place, where the information contained therein is required by law.

2. Application

2a. Purpose

The purpose of this policy is to improve overall environmental compliance and thus environmental quality by encouraging the use and confidentiality of environmental evaluations without compromising law enforcement, the administration of justice or pollution abatement in Ontario. This involves striking a balance between MOEE's regulatory responsibilities and the ability of individuals to privately assess their own environmental performance in good faith without increasing their risk of prosecution under environmental laws administered by MOEE.

2b. Restrictions on Access

Under this policy, abatement and compliance inspections carried out by the MOEE will be conducted in a manner which will encourage the practice of environmental evaluations. For this reason, the MOEE will not, as a matter of course, request access to environmental evaluations. When requesting access to environmental evaluations MOEE inspectors and investigators will advise representatives of the relevant company that they are not obliged to voluntarily share evaluations with MOEE. Refusal to provide voluntary access to environmental evaluations will not result in obstruction charges.

3. Voluntary Disclosure of Environmental Evaluations

MOEE encourages the voluntary sharing of information by those seeking pollution abatement through voluntary arrangements with Government. These arrangements may provide protection from prosecution for those who are committed to addressing environmental issues. This type of arrangement is provided for under MOEE's current compliance policy in the form of Program Approvals.

3a. Program Approvals

Under the system of Program Approvals, a person responsible for a source of contamination may submit to a MOEE Regional Director a program to prevent, reduce or control the discharge of any contaminant into the natural environment. The MOEE may then approve the program and allow the business a specified period of time to implement its environmental plan.

3b. Protection from Prosecution

A person who complies fully with a Program Approval under the *Environmental Protection Act* is immune from prosecution for the matters dealt with under the program. Where an environmental evaluation discloses pollution problems, for example, the environmental evaluation may be submitted, in whole or in part, together with a plan for a Program Approval. In this way, a business, industrial, commercial or agricultural operation whose environmental evaluations disclose potential environmental risks are encouraged to reduce pollution by entering into a Program Approval with the MOEE to address the source of the problem while protecting the business from prosecution.

4. Circumstances When Involuntary Disclosure May Be Required

4a. Abatement Inspections

It is the policy of MOEE that inspectors will not, as a matter of course, request access to environmental evaluations during routine inspections for compliance.

Where there is an occurrence and access to an environmental evaluation is required by MOEE, an inspector shall first request voluntary consent to obtain the relevant portion(s) of the evaluation and the inspector shall also advise that there is no obligation to provide the evaluation or any relevant portion(s) thereof. A refusal at this stage to provide voluntary access to an evaluation or any relevant portion(s) thereof will not give rise to an obstruction charge against the individual(s) or the company.

If consent is not given, then before seeking a Judicial Inspection Order an inspector shall obtain authorization of the Regional Director, or the person acting as the Regional Director, who must be satisfied that only relevant portion(s) of the evaluation have been requested and that the requesting inspector, on the advice of Legal Counsel, believes on reasonable grounds that:

- i) the evaluation's findings will be relevant in addressing the environmental problem; and
- ii) the information being sought through the evaluation cannot reasonably be obtained from other sources through the exercise of inspector's abatement powers; and
- iii) the information is necessary for administering the Acts.

During inspections, an environmental evaluation will only be obtained with the consent of the party being inspected, or where the above-conditions have been met and where a Judicial Inspection Order has been issued pursuant to section 158 of the *Environmental Protection Act* or similar provisions under other legislation.

4b. Enforcement Investigations

Where access to an environmental evaluation is required by MOEE, an investigator shall first request voluntary consent to obtain the relevant portion(s) of the environmental evaluation and the investigator shall also advise that there is no obligation to provide the evaluation or any relevant portion(s) thereof. A refusal at this time to provide voluntary access to an evaluation or relevant portion(s) thereof will not give rise to an obstruction charge against the individual(s) or the company.

If consent is not given, then before seeking a search warrant an investigator must obtain authorization of Senior Regional Investigation and Enforcement Branch Management, or the person acting as Senior Regional Enforcement Branch Management, who must be satisfied that only relevant portions of the evaluation have been requested and that the requesting investigator, on the advice of Legal Counsel, has reasonable grounds to believe that:

- i) an offence has been committed; and
- ii) the evaluation's findings are relevant to the particular violation and necessary to its investigation; and
- iii) the information being sought through the evaluation cannot reasonably be obtained from other sources through the exercise of investigator's powers.

During investigations, an environmental evaluation will only be obtained with the consent of the party under investigation or where the above-conditions have been met and a search warrant has been issued.

4c. Emergencies

An environmental evaluation may only be obtained without a search warrant or judicial order when the delay necessary to obtain the search warrant or judicial order would likely result in:

- i) an immediate danger to health or safety, or
- ii) serious risk to the quality of the environment, or
- iii) the loss or destruction of relevant evidence.

Environmental evaluations produced where exigent circumstances exist will, except where obtained to prevent the loss or destruction of evidence, only be used to address the immediate environmental emergency. Except when necessary to address the emergency at another location or to prevent the loss or destruction of evidence, evaluations shall not be copied or removed from the premises where they are normally located. Failure to provide evaluations during an emergency could result in obstruction charges.

5. Protection from Use in Prosecution

In order to further protect confidentiality, evaluations obtained voluntarily or involuntarily by the MOEE under this policy will not be used against the individual, business, industrial or agricultural entity, by or for whom the evaluation was prepared, in any prosecution proceedings, provided the individual, business, industrial, commercial or agricultural entity can demonstrate to MOEE good faith in taking environmentally responsible action.

A business, industrial, commercial or agricultural entity shall be considered to have demonstrated good faith when:

- i) it has undertaken an environmental evaluation; and
- ii) it has initiated timely action to correct or to prevent any environmental deficiencies; and
- iii) it has co-operated fully and promptly with authorities in addressing issues of non-compliance identified in the evaluation.

6. Scope

This policy is not intended to provide a means to shelter information in an evaluation and, except as expressly provided above, protection offered under this policy does not apply to: (1) any monitoring, compliance or other information which the MOEE or other regulatory authorities may require under the *Environmental Protection Act* or any other law; (2) any legal action available to authorities to carry out enforcement, compliance, monitoring or prosecutions where the entity in question cannot demonstrate good faith; and, (3) any evaluations which have previously entered the public domain.

A business cannot refuse, for example, to provide compliance information on the basis that it is contained in a self-initiated Evaluations.

Where an inspector or investigator requests access to an environmental evaluation from a third party, the inspector or investigator will comply with the terms of this policy.

his policy does not affect any existing rights or obligations currently afforded by law to

persons regarding disclosure of information under the Freedom of Information and Privacy Protection Act. Companies which disclose results from environmental evaluations will not be taken to have waived any legal privilege over the environmental evaluations.

7. Term of the Policy

This policy and guideline will be reviewed with input from interested stakeholders, including the business community, within five years to determine its effect on:

- i) the practice and quality of Environmental Evaluations,
- ii) environmental performance, and,
- iii) MOEE's ability to carry out its abatement and enforcement responsibilities.

During the term of this policy all requests for involuntary disclosure of environmental evaluations whether by judicial order, search warrant or under emergency situations will be recorded along with the outcome of any actions as information to be considered during the policy and guideline review.

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- . . . PIB No. 3199e
 - . . . Policy No. H-9

To obtain a copy of the *Policy and Guideline on Access to Environmental Evaluations* (PIB No. 3199e, in English only), contact:

- . . . Ministry of Environment and Energy
- . . . Public Information Centre
- . . . 135 St. Clair Avenue West
- . . . Toronto, Ontario
- . . . M4V 1P5

- . . . Telephone: (416) 325-4000
- . . . Toll-Free: 1-800-565-4923
- Fax: (416) 323-4564

